IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-901

C. MURRAY HENDERSON, Warden,
Petitioner,

v.

ALBERT WILLIAM HALE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner, C. Murray Henderson, Warden, Tennessee State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 5, 1973.

OPINION BELOW

The opinion of the Sixth Circuit, ...F.2d. ..., not yet reported, is reproduced as Appendix A. The memorandum decision of the District Court of May 23, 1972 is attached as Appendix B. The Sixth Circuit denied a petition to rehear December 4, 1973.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 5, 1973. This petition for certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Was a free and voluntary confession made to the police by a first degree murder suspect 42 hours after an unlawful arrest a "fruit of the poisonous tree" where the confession was made under noncoercive conditions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . nor be deprived of life, liberty, or property, without due process of law . . . "

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§2241. *Power to grant writ*

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless——

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

STATEMENT OF THE CASE

The defendant was convicted in Memphis, Tennessee of first degree murder and sentenced to life imprisonment in 1965. On federal habeas corpus, a new trial was ordered by the District Court suppressing physical evidence seized on the basis of an illegal arrest and unconstitutional search, and no appeal of this ruling was taken. The State won in the District Court on the proposition of whether or not the confession which was introduced against him was the product of an illegal and unconstitutional arrest, but the United States Court of Appeals for the Sixth Circuit in an opinion by Judge Edwards reversed, holding that the statement made approximately 42 hours after the arrest was in violation of the rule announced by this Court in *Wong Sun v. United States*, 371 U.S. 471 (1963).

REASON FOR GRANTING THE WRIT

The Sixth Circuit's opinion in this case is in conflict with *Wong Sun v. United States*, *supra*, and settled case law.

In order to understand how erroneous is the decision of the Sixth Circuit, it is necessary to look at the circumstances under which the confession was given. These factual circumstances are somewhat detailed in the District Court's memorandum decision set out in Appendix B. The question is not whether the evidence would have come to light but for the illegal arrest; the question is "whether the evidence has been come at 'by means sufficiently distinguishable to be purged of the primary taint.'" *Sweeney v. United States*, 391 F.2d 190, 194 (5th Cir. 1968). The District Judge held an evidentiary hearing and determined that the 42-hour period which elapsed had attenuated the primary taint. Based on a cold record, the Sixth Circuit reversed that determination.

The afternoon following his arrest Mr. Hale talked to his wife who had been brought down to the police station and discussed the matter with her privately. He was not held under coercive conditions. He was not deprived of food. He was not in any way threatened with the prosecution of any members of his family. The District Judge even pointed out that a psychological circumstance that was worthy of note was that the defendant, a black man, was arrested by two black city detectives, who initially questioned him, and one of whom was present at the subsequent questioning. On more than one occasion he was advised of his right to have counsel present but did not ask for such counsel.

This is not a case where the equities cry out for a defendant's relief. There is no intimation whatsoever of police misconduct. From the very beginning the finger of suspicion pointed at the defendant. Although reasonable minds could certainly disagree whether or not the original arrest was based on probable cause, the State,

unfortunately, through earlier counsel failed to appeal this ruling to the Sixth Circuit.

This is not a question of the defendant's guilt since the integrity of the fact-finding process is not at issue. Even the original "taint" is highly questionable. The Sixth Circuit seems to hold erroneously that if statements are made possible by and are a product of an illegal arrest, then those statements cannot, under circumstances such as these, become sufficiently attenuated as to dissipate the taint. This erroneous interpretation of the rule of *Wong Sun* should not be allowed to stand uncorrected.

CONCLUSION

The Court should issue a writ of certiorari to reverse the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

[1]

No. 72-2185

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALBERT WILLIAM HALE,
Petitioner-Appellant,

v.

C. MURRAY HENDERSON, Warden, Tennessee State Penitentiary,
Respondent-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed October 5, 1973.

Before: EDWARDS and MILLER, Circuit Judges, and LAMBROS,* District Judge.

EDWARDS, Circuit Judge. This petitioner, after issuance of a writ of habeas corpus in his favor by the United States District Court for the Western District of Tennessee, appeals the two issues which the District Court decided against him. The state did not appeal from the District Court's grant of the writ of habeas corpus, but does resist reversal of the two issues decided in its favor below. In the interest of judicial economy, we decide both issues sought to be appealed.

*Honorable Thomas D. Lambros, United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix A

Petitioner was indicted and convicted of first degree murder and sentenced to life imprisonment in 1965. Concededly he has exhausted state remedies on the issues concerned.

This case has a lengthy history. Its factual background may be found recited in *Hale v. Henderson*, 400 F.2d 655 (6th Cir. 1968) (where this court remanded the instant habeas corpus case to the District Court for evidentiary hearing on the admissibility of petitioner's confession), and in *Hale v. Henderson*, 336 F. Supp. 512 (W.D. Tenn. 1972). On remand of this case after evidentiary hearing, the District Judge found facts warranting issuance of the writ of habeas corpus on the basis of an illegal arrest and unconstitutional search, the products of which had been admitted against appellant. But he specifically rejected petitioner's additional claims 1) that the confession which was introduced against him was the product of an illegal and unconstitutional arrest, and 2) that the grand jury which had indicted him was unconstitutionally constituted in that no black foreman or foreman pro tem of the jury had ever been appointed in Shelby County, albeit 150 such appointments had been made by the District Judge in whom state law placed that authority.[1]

As to the confession issue, the District Judge found that the arrest of petitioner on the day after the murder was discovered was not based on probable cause and was illegal and violative of petitioner's constitutional rights. The state does not dispute this finding. The District Judge

[1]The District Judge who heard this case separated this issue from the others and it was heard before a District Judge from the Eastern District of Tennessee, who held that no relief was appropriate. The two decisions were subsequently incorporated in one order for purposes of this appeal.

also found that the confession was not the product of the illegal arrest:

> Here the statement was made approximately 42 hours after the arrest and after petitioner had talked privately with his wife and after he had been confronted with all of the witnesses. He then hung his head and said he would tell what had happened. The means of obtaining the statement, we therefore find, were "sufficiently distinguishable as to be purged of the primary taint."

The last quoted phrase is found in *Wong Sun v. United States* in the following sentences:

[3] > We now consider whether the exclusion of Toy's declarations requires also the exclusion of the narcotics taken from Yee, to which those declarations led the police. The prosecutor candidly told the trial court that "we wouldn't have found those drugs except that Mr. Toy helped us to." Hence this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence "from an independent source," *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392; nor is this a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341. We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged

of the primary taint." Maguire, Evidence of Guilt, 221 (1959). We think it clear that the narcotics were "come at by the exploitation of that illegality" and hence that they may not be used against Toy. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

Toy's statement had previously been held inadmissible because of an unconstitutional arrest during which the statement was made. The distinction made in this same case holding Wong Sun's statement to be admissible is instructive:

> We turn now to the case of the other petitioner, Wong Sun. We have no occasion to disagree with the finding of the Court of Appeals that his arrest, also, was without probable cause or reasonable grounds. At all events no evidentiary consequences turn upon that question. For Wong Sun's unsigned confession was not the fruit of that arrest, and was therefore
> [4] properly admitted at trial. On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341. *Wong Sun v. United States*, *supra* at 491.

In our instant case there was no break in custody (and apparently little break if any in custodial interrogation, *see Hale v. Henderson*, 400 F.2d 655, 657 (6th Cir. 1968)) prior to petitioner's confession. Contrary to the holding of the District Judge, we do not believe that "the connection between the arrest and the statement had become so attentuated as to dissipate the taint." *Wong Sun v. United*

States, *supra* at 491. The confrontations which preceded the statement were made possible by and were a product of the illegal arrest.

Appellee's brief cites only one case in support of its argument for affirmance. *Swinney v. United States*, 391 F.2d 190 (5th Cir. 1968). We find no reason to disagree with the holdings of the Fifth Circuit in that case, but consider the facts to be completely inapposite. The court there declined to decide whether or not there had been "a primary taint" and held that the arrest and search were lawful and valid.

As to the confession issue, we reverse the District Court and hold that petitioner's custodial statement was a fruit of the poisonous tree and should be excluded at any retrial of this case.

As to the last appellate issue pertaining to the petitioner's claim of unconstitutional racial discrimination in the choice of (or the system of choosing) the grand jury foremen, we affirm the District Court.

Appellant did not raise this issue at the time of his original trial but subsequently did so in a state habeas corpus proceeding. We do not think we can properly dispose of this issue under the rationale of the recent decision of the United States Supreme Court in *Davis v. United States*,
[5] —U.S. —, 41 U.S.L.W. 4478 (April 17, 1973). Here the Tennessee Supreme Court passed on the appellant's federal constitutional contention as to the grand jury foreman on the merits. In this situation settled case law holds that the federal courts will likewise reach the merits. *Warden v. Hayden*, 387 U.S. 294, 297 n.3 (1967); *Irwin v. Dowd*, 359 U.S. 394, 406 (1959); *Brown v. Allen*, 334 U.S. 443, 486 (1953); *Herndon v. Lowry*, 301 U.S. 242, 247 (1937).

Appendix A

As to the grand jury foreman issue the judge who heard the evidence found:

> Notwithstanding the petitioner's argument that grand jury foremen have been arbitrarily appointed and that over a period of history all grand jury foremen so appointed have been white, it appears that the particular grand jury indicting the petitioner was composed wholly of men selected from the venire. The grand jury indicting the petitioner was not chaired by the regular foreman, but by the foreman pro tempore, who was chosen from a body of grand jurors which were selected from the venire. There has been no evidence produced, nor has it been argued that the venire was discriminatorily constituted. The court must conclude that the venire was selected in a manner that did not systematically exclude blacks.
>
> The foreman pro tempore was, prior to his appointment, a member of the grand jury body that ultimately rendered the petitioner's indictment. Following his appointment, his vacancy on the jury was filled by a member of the venire. Judge Sellers, Judge of Division I of the Criminal Court of Shelby County, Tennessee, wherein the petitioner was convicted, testified that the formation of the grand jury body was purely by lot. Certainly it cannot be contended that the foreman pro tempore's presence on the grand jury was effected by a discriminatory selection process.
>
> The court does not believe that the fact that Judge Sellers exercised his discretion in appointing a member of the grand jury body to act as foreman pro tempore
> [6] is significant where the members he chose from were all randomly selected. That Judge Sellers had the

authority to select, in whatever manner he saw fit, the man whom he thought could best discharge the duties of foreman, was not discriminatory where the body from which the selection was made had been randomly created.

Some additional facts should be added.

It is undisputed that the grand jury which indicted petitioner was headed by a foreman pro tempore who was selected from the then existing grand jury (which had black grand jurors) and that that grand jury was chosen at random from a grand jury venire whose constitutionality is not disputed and which did in fact contain black citizens in general proportion to their presence in the population of Shelby County.

The state judge who had the statutory power to appoint both the grand jury foreman and in his absence the foreman pro tempore, testified that he had considered black grand jurors, but had largely relied upon the foreman's recommendation in choosing foremen pro tempore. The net effect of his testimony was to deny any racially discriminatory intention in the appointment of four foremen and 146 foremen pro tempore. Petitioner, however, points out that in fact all of the appointees were white.

Petitioner also points out that the grand jury foreman has important statutory duties in Tennessee, T.C.A. §§ 40-1510, 40-1622 (1955), and exercises a leadership role as well as casting a vote in the grand jury. Although petitioner points to no legal barrier to the appointment of black foremen and makes no claim of prejudice in his indictment from any action of the white foreman pro tempore of the grand jury which indicted him, we are by no means unimpressed by dominant race appointments in 150 successive instances.

We do not, however, find a curative measure available. Proportional representation is not required either in grand juries or in the appointment of grand jury foreman. *Swain* [7] *v. Alabama*, 380 U.S. 202, 208-09 (1965); *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950).

We have read and considered the holding of the cases relied upon by petitioner in this case. *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940). They all pertain, however, to unconstitutional exclusion of blacks from grand jury venires or grand juries. No such exclusion is claimed in this case.

The closest case in point appears to be *Carter v. Jury Commission*, 396 U.S. 320, 338-39 (1970), where the Supreme Court again clearly rejected proportional representation as a constitutionally required (or permitted) remedy. *See also Swain v. Alabama*, *supra* and *Cassell v. Texas*, *supra*. This case dealt with an historically all white jury commission which had consistently selected jury lists palpably distorted against Negro representation. Nonetheless, the Court held:

> For present purposes we may assume that the State may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves. But the District Court found the appellants had shown only that for many years the jury commission had been composed entirely of white men, and concluded that without more the appellants' attack failed for want of proof. We think that ruling was correct. Quite apart from the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way, we cannot say on this record that the absence of Negroes

from the Greene County jury commission amounted in itself to a prima facie showing of discrimatory exclusion. The testimony before the District Court indicated that the Governor had appointed no Negroes to the Green County commission during the 12 years preceding the commencement of suit. But the appellants' trial counsel conceded that he could not prove his charge of discriminatory selection without the testi-
[8] mony of the Governor. Whether or not such a concession was necessary, the statement may well have led counsel for the appellees to conclude that they were not obliged to produce witnesses on the State's behalf with respect to this phase of the appellants' case.

Nor can we uphold the appellants' present contention that, apart from the question of discrimination in the composition of the jury commission, the absence of Negroes from the commission compelled the District Court to order the appointment of Negro commissioners. The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury. *Carter v. Jury Commission*, *supra* at 338-39. (Footnote omitted.)

We feel the principles applied in *Carter* to jury commissioners would apply a fortiori to our instant problem dealing with jury foremen pro tempore. Thus we are bound to follow *Carter* until and unless it is overruled.

As to this issue the judgment of the District Court is affirmed.

The judgment of the District Court is reversed in part and affirmed in part, and the case is remanded to the District Court for further proceedings consistent with this opinion.

LAMBROS, District Judge, concurring.

[9] I disagree with the majority opinion's application of *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970).

The major question presented on the grand jury issue is whether the rule that a black criminal defendant is entitled to have his indictment quashed, regardless of prejudice, if the grand jury venire selection system discriminates against blacks should be extended to a situation in which there has been systematic discrimination only with respect to one member of the grand jury venire—the grand jury foreman pro tempore. The majority opinion does not specifically discuss this issue. Instead, it rules that the issues are governed by the Supreme Court decision in *Carter v. Jury Commission of Greene County*. I disagree that *Carter* is relevant and binding for two reasons.

First, the language quoted from *Carter* in the majority opinion, which states that the facts presented regarding discrimination in the jury commission were insufficient to warrant a prima facie finding of discrimination, is not dispositive of the facts in this case. In general, a showing that the percentage of blacks selected over a period of time varied significantly from the percentage of blacks in the population and that the selection system is amenable to discrimination is sufficient to warrant a prima facie finding of discrimination. *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972); *Eubanks v. Louisiana*, 356 U.S. 584, 587 (1958); *Neal v. Delaware*, 103 U.S. 370, 397 (1881). Even in *Carter*, in a portion not quoted in the majority opinion, the Supreme Court cited as "compelling" evidence of discrimination the fact that the number of blacks on the jury rolls never exceeded 7 per cent while

the county population was 15 per cent black—inspite of the lack of evidence of discrimatory intent on the part of those officials selecting the venire. *Carter*, *supra* at 327, 337. That portion of *Carter* quoted in the majority opinion is inapposite, since it merely indicates that the Court did not find the statistics regarding the jury com-
[10] mission of three persons as compelling as those for the larger number of persons on the venire. *Id.* 338.

Under the rationale developed in these cases, the evidence clearly warranted a prima facie finding of discrimination in the selection of the grand jury foreman pro tempore. The evidence showed that in the history of the county *none* of the 150 foremen and foremen pro tempore had been black while the county population was from 25 to 37 per cent black and further that the criminal trial judge who had the discretion with respect to the appointment of foremen and foremen pro tempore knew only a few blacks. It is difficult to imagine what more the majority would require to warrant a prima facie finding of discrimination except a confession on the part of the state judges that they were prejudiced against blacks and had intentionally avoided appointing them as grand jury foremen pro tempore.

Second, I believe the language quoted from *Carter* regarding proportional representation is not relevant here. While *Carter* was brought by black residents seeking representation on the grand jury and grand jury commission, this case was brought by a criminal defendant seeking to have his indictment quashed. The relief sought in *Carter*, that of proportional representation, was denied by the Supreme Court. However, the relief sought here is not proportional representation but rather the quashing of an indictment because of systematic exclusion of blacks

from the position of grand jury foreman pro tempore. With respect to this relief, the issue of proportional representation is irrelevant.

With respect to the major question presented, I would not require a quashing of the indictment because of discrimination in the selection of the grand jury foreman pro tempore. The remedy of quashing the indictment without a showing of prejudice was one adopted by Justice Harlan in 1881 because without it "the constitutional prohibition has no meaning. *Neal v. Delaware*, 103 U.S. 370, 397 (1881). Although the *Neal* ruling has been
[11] applied continuously during the past ninety years, it has not been broadened to apply to the situation in which the grand jury foreman pro tempore rather than the grand jury itself has been selected through a racially discriminatory system. *Alexander v. Louisiana*, 405 U.S. 625, 628-632 (1972) (applying *Neal* to discrimination with respect to the grand jury venire).

In determining whether the extraordinary remedy of quashing an indictment after conviction without a showing of prejudice should be broadened to cover this situation, it is important to examine the social policy reasons for which the original ruling was adopted to determine whether that rationale also compels the creation of a similar ruling regarding the grand jury foreman pro tempore. The *Neal* ruling was based on the lack of alternative remedies to discrimination with respect to the grand jury system and the importance of the grand jury in the criminal system. Since there are presently effective class action remedies available for discrimination under 42 U.S.C. §1983 and since the grand jury foreman pro tempore has a role less critically important to the criminal process than the entire grand jury, the rationale of the *Neal* ruling

is not directly applicable to the case at hand. I would therefore decline to broaden the *Neal* ruling to require quashing the indictment without a showing of prejudice, even though the grand jury foreman pro tempore was selected under a discriminatory system.

For these reasons, I would concur with the result reached in the majority opinion.

APPENDIX B

[fol. 1] IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALBERT WILLIAM HALE,
Petitioner

v.

C. MURRAY HENDERSON, Warden,
Tennessee State Penitentiary,
Respondent

CIVIL NO. C-67-130

MEMORANDUM DECISION

Petitioner, Albert William Hale, a Negro, is serving a life sentence in a Tennessee penitentiary for first degree murder in 1965 in Shelby County (Memphis). He filed this federal habeas petition on May 10, 1967, contending that his incriminating statement was obtained in violation of his federal constitutional rights in the manner of his interrogation. We concluded, based on the state criminal trial transcript, that such was not so and dismissed the petition by opinion and order (unreported) entered on July 26, 1967. The Court of Appeals reversed, holding that an evidentiary hearing was required. 400 F.2d 655 (1968). Thereafter, by amendment, petitioner added the contentions (1) that his statement was improperly obtained for the additional reason that it was obtained after he had been unlawfully arrested and therefore was a "fruit of the poisonous tree," (2) that his automobile was illegally searched and evidence obtained that was used against him, and (3) that

Negroes were unconstitutionally discriminated against in the selection of foremen of the grand jury in Shelby County, including the grand jury that indicted him. Petitioner then exhausted his state remedies as to these additional claims and returned here. We ruled that petitioner was also entitled to an evidentiary hearing as to such claims. [fol. 2] 336 F.Supp. 512 (1972). The history of this litigation is more fully set out in the opinions heretofore cited.

We recused ourself with respect to the contention of discrimination in the selection of foremen of the grand jury, and an evidentiary hearing has since been held on that issue by the Hon. Mac Swinford, United States District Judge for the Eastern District of Kentucky. We have since held two evidentiary hearings on the other issues.

As noted in our first opinion in this litigation, the interrogation of petitioner took place after *Escobedo* (378 U.S. 478) but before *Miranda* (384 U.S. 436). We are satisfied, based upon the evidence adduced at the evidentiary hearings held by us, that petitioner's will was not overborne by the interrogators. He was questioned briefly after he was arrested early on a Sunday morning at around 1:30 a.m. and again during the day on Sunday at around noon. On Monday, during an afternoon interrogation, he wanted to talk to his wife, who was brought down to the police station and did talk to him privately. Petitioner also said he would not make a statement unless the witnesses who were with him and the deceased the night she was murdered were brought down to confront him.* This was done, and petitioner did then make a statement, in which he at least

* Three of these witnesses were among those who testified at the instant habeas hearings.

partially exculpated himself. During the periods he was not being questioned, petitioner was not, as he contended, held in the office of the homicide bureau but instead was taken back to his cell. He was not deprived of [fol. 3] food. He was not, directly or indirectly, threatened with his wife's prosecution or his children being taken to juvenile court. A psychological circumstance that should be mentioned for completeness is that, while petitioner is a Negro, so also were the two city detectives, Marshall and Berkeley, who arrested him and initially questioned him, and one of these detectives, Lieut. Marshall, was present at the subsequent questioning. Petitioner was advised of his right to have counsel present more than once but did not ask for such counsel. Accordingly, we conclude that the interrogation satisfied pre-*Miranda* standards and did not violate petitioner's rights as set out in *Escobedo*.

This brings us to the contentions that petitioner's statement was illegally obtained because it was made while he was being held in custody following an illegal arrest and that his automobile was illegally searched. In this connection, petitioner contends that there was no probable cause for his arrest or for the search.

The body of a young Negro woman was found by the Crittenden County, Arkansas, sheriff's office beneath the Arkansas end of a Mississippi River Bridge at Memphis in the early daylight hours on Saturday Morning, March 27, 1965. She had been stabbed to death. Lieut. Marshall of the Memphis Police Department and later Detective Berkeley were assigned to cooperate with the Arkansas authorities in making the investigation. They were unable to ascertain the identity of the deceased by anything found on her person, but later that day, through a radio station

announcement, they were put in touch with the deceased's mother and learned that she was Joyce Cash. The detectives also learned from the mother that she was a waitress at the Orbit Cafe on McLemore Avenue in Memphis.

[fol. 4] From the owner of the cafe, Richard Lewis, they discovered that a man known to him only as "William," and who worked at a fish house, had come into the cafe about 1:00 a.m. Saturday morning and had made a date with Joyce and that shortly thereafter Joyce left with this man in his car together with several other men and women. Marshall then sought out a man known to him as "Fish House Red," and described "William" to him as he had learned from the cafe owner. "Fish House Red" said that he thought he was talking about "Johnny Williams" but that all knew him as "Black Elvis Presley." Marshall testified that this rang a bell with him because these were aliases for Albert William Hale whom Marshall had previously handled for shooting a young girl who had refused him her favors. He then checked the record at the Police Department, obtained petitioner's address, and went to his apartment and arrested him about 1:00 a.m. on Sunday morning "for investigation for the murder of Joyce Cash."

Marshall conceded that he did not think, at the time of the arrest of petitioner, that he had enough proof to apply for an arrest warrant for murder and Berkeley was of the same opinion.* But, argues respondent, even thought the arresting officers did not believe that they had probable cause to arrest petitioner for murder, the arrest was still valid if in fact and objectively they had probable cause. This is an interesting contention, but we need not resolve it since we find that the detectives did not have probable

* Apparently at that time the officers thought that petitioner could lawfully be arrested "for investigation" though they did not have grounds to arrest him for the killing.

cause for the arrest. We say this because all they had was that petitioner had made a date with Joyce Cash and that she had left the cafe in his company and five other people around 1:00 a.m. and that on a prior [fol. 5] occasion he had shot another girl who had resisted his advances. The detectives did not ascertain until after petitioner's arrest, and after they had talked with the other persons, that these other persons had been dropped by petitioner shortly after they left the cafe and that Joyce Cash was still with him. Thus we conclude that the arrest of petitioner was an illegal arrest.

The next question is, then, is the statement of petitioner obtained Monday evening a "fruit of the poisonous tree" under the doctrine of *Wong Sun v. United States*, 9 L.Ed. 2d 441? We conclude that it is not.*

We construe *Harrison v. United States*, 20 L.Ed.2d 1047, as placing the burden on respondent to show that the statement is not so related to the illegal arrest as to be inadmissible, and this is a question of fact (*United States v. McGavic*, 337 F.2d 317 (6th Cir.)). The question here, however, is not whether the evidence would not have come to light but for the illegal arrest; the question is "whether the evidence has been come at 'by means sufficiently distinguishable to be purged of the primary taint.' " *Sweeney v. United States*, 391 F.2d 190, 194 (5th Cir.). Here the statement was made approximately 42 hours after the arrest and after petitioner had talked privately with his wife and after he had been confronted with all of the witnesses.

* We are not concerned with the **McNabb** principle (87 L.Ed. 819) that rules out statements obtained during an undue delay before taking a prisoner before a magistrate; that case represents an exercise of supervisory power over federal courts. United States v. Tamailolo, 317 F.2d 324 (2nd Cir.).

He then hung his head and said he would tell
[fol. 6] what had happened. The means of obtaining the statement, we therefore find, were "sufficiently distinguishable as to be purged of the primary taint."

This brings us to validity of the search of the petitioner's automobile without a warrant.

At the outset we must deal with the possibility that the search might be approved on the ground that it was done with the consent of petitioner. It appears that after petitioner had been arrested in his apartment at around 1 a.m. on the Sunday morning, and while the officers were taking him away, petitioner's automobile, which had been described to the officers by the cafe owner, was spotted in the parking lot of the apartment building. According to Marshall and Berkeley, which is denied by petitioner, they asked for and obtained permission of petitioner to search his car.

The burden is on the respondent to show that petitioner gave his consent to search the automobile freely, voluntarily and understandingly. *Bumper v. North Carolina*, 391 U.S. 543; *Annotation*, 9 A.L.R. 3rd 858, 864. The fact that petitioner was under arrest when he allegedly gave his consent tends to indicate that the consent was not voluntary. *Annotation*, *supra*, at 875. In weighing the testimony of the officers and particularly the likelihood of their correctly remembering the details of the alleged consent to the search, it should be pointed out that no issue was made of the validity of the search at the criminal trial in 1965.* Thus the first time, it appears, that the officers were

* We dealt with the question of the possible waiver by petitioner of this claim in our opinion in 336 F.Supp. 512; we do not understand respondent to contend that it has been waived.

[fol. 7] called upon to testify on this subject was at the habeas hearing here in April, 1972. Moreover, while at the criminal trial Marshall testified that blood was found in the car, Berkeley testified here that the only evidence that was found was that the floor mats were wet, indicating that the inside had recently been washed, and Marshall testified here that the only evidence found was the wet mats and some wool nap that was the same as was seen where the body was found. This would indicate that the memory of the officers was fuzzy at the time of the instant habeas hearing as to the circumstances of the search. We conclude, therefore, that respondent has not carried his burden of showing the petitioner freely, voluntarily and understandingly gave his consent to search his car.

Since respondent concedes that the claimed probable cause to search the car is the same as the claimed probable cause to arrest petitioner and since we have already determined that there was no probable cause for the arrest, we also conclude that there was no probable cause for the search.* Thus the evidence introduced at the trial, through the testimony of Marshall, that blood was found in petitioner's car was obtained in violation of his 4th - 14th Amendment rights and accordingly a new trial must be accorded to petitioner.

Ordinarily, in this situation, we would enter an order requiring that petitioner be tried again within a reasonable time, usually 60 days, or that he be discharged from custody. However, the question now before Judge Swinford, which has not yet been decided, involves the validity of

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* Even if there had been probable cause for the search, the opinion of Justice Stewart in Coolidge v. New Hampshire, 403 U.S. 443, throws considerable doubt on the validity of the search since there was no warrant.

petitioner's indictment, and if Judge Swinford should decide that the indictment is invalid, it would be necessary again to submit petitioner's case to another grand jury. Accordingly, we will enter no order pursuant to this memorandum decision until Judge Swinford has ruled on the question before him.

[fol. 8]

ENTER this 23rd day of May, 1972.

BAILEY BROWN
CHIEF JUDGE